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Law Offices  
**HUB LAW OFFICES**  
711 Sir Francis Drake Boulevard  
San Anselmo, California 94960  
(415) 258-0360

FORD GREENE, Bar # 107601

Attorney for Defendant  
**GERALD ARMSTRONG**

**FILED**

**SEP 18 1995**

**HOWARD HANSON**  
MARIN COUNTY CLERK  
by J. Steele, Deputy

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**FOR THE COUNTY OF MARIN**

CHURCH OF SCIENTOLOGY INTERNATIONAL,) )  
a California not-for-profit religious corporation, ) )

Plaintiff, ) )

vs. ) )

GERALD ARMSTRONG; MICHAEL WALTON; ) )  
THE GERALD ARMSTRONG CORPORATION, ) )  
a California for-profit ) )  
corporation; DOES 1 through 100, ) )  
inclusive, ) )

Defendants. ) )

No. 157 680

DEFENDANT'S OPPOSITION TO  
MOTION FOR SUMMARY  
ADJUDICATION ON THE THIRTEENTH,  
SIXTEENTH, SEVENTEENTH, AND  
NINETEENTH CAUSES OF ACTION

Date: September 29, 1995  
Time: 9:00 a.m.  
Dept: One (1)  
Trial Date: None Set

**RECEIVED**

**SEP 18 1995**

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1       **I.       INTRODUCTION**

2               With respect to Armstrong's opposition to the thirteenth, sixteenth, seventeenth and  
3 nineteenth causes of action, Armstrong specifically adopts and incorporates all facts and legal  
4 arguments set forth in his opposition to Scientology's motion for summary adjudication of the  
5 twentieth cause of action.

6       **II.       STATEMENT OF FACTS**

7               Prior to the execution of the settlement agreement in later 1986, Gerald Armstrong had been  
8 the subject of the unrelenting application of Scientology's fair game policy. (Sep.St. Defendant's  
9 Evidence ¶ 41) Armstrong had not subjected Scientology to fair game and did not have any such  
10 policy. (Sep.St. Defendant's Evidence ¶ 42) Scientology contracted with Armstrong's former  
11 counsel, Michael Flynn, to not represent or defend him in the event that Scientology continued to  
12 attack Armstrong. (Sep.St. ¶ 43) The liquidated damages provision applied to over seventeen years  
13 of Armstrong's life concerning which it was not possible for him to be silent. (Sep.St. ¶ 44)  
14 Although Scientology induced Armstrong to enter the agreement by promising to cease its fair game  
15 activities, it had no intention of so doing. In fact, its true intention was to publish its own false  
16 accounts of Armstrong's history. (Sep.St. ¶ 45) Immediately after the "settlement," Scientology  
17 provided its account of Armstrong's history, and documents regarding that account, to the *Los*  
18 *Angeles Times* and to the *London Sunday Times*. (Sep.St. ¶ 46)

19               By virtue of paragraph 4-B of the settlement agreement Scientology was going to appeal  
20 Judge Breckenridge's decision against it unopposed by Armstrong, which it did. Thus, through the  
21 acts of Scientology and its lawyers at the time of the settlement, Armstrong's entire history which  
22 was contained in the trial court record, became a public record in the court of appeal. (Sep.St.  
23 Defendant's Evidence ¶ 47) Since Scientology maintained its appeal of Judge Breckenridge's  
24 decision, and concomitantly subjected Armstrong to further fair game actions, it fomented  
25 controversy and the potential for further litigation. (Sep.St. ¶ 48)

26               Scientology was not damaged in any way monetarily by any statement made by Armstrong  
27 prior to the settlement. (Sep.St. ¶ 49) There is no relationship between the actual damages  
28 suffered by Scientology and the \$50,000 liquidated damages provision. (Sep.St. ¶ 50) In its first

1 amended complaint, Scientology sought \$950,000 for a single letter written by Armstrong on  
2 December 22, 1992 pursuant to the liquidated damages provision. (Sep.St. ¶ 75) In Scientology's  
3 instant motion it claims that Armstrong spoke multiple times with anti-Scientology lawyer Graham E.  
4 Berry, met with a cadre of other anti-Scientology witnesses, and discussed his experiences in  
5 Scientology. Armstrong also provided two declarations to Mr. Berry. For this alleged misconduct  
6 Scientology claims \$50,000 in liquidated damages. (Sep.St. ¶ 76)

7 All of the money that Scientology has spent on litigation concerning Armstrong has been to  
8 further its fair game goals in violation of Armstrong's basic human and civil rights, not on repairing  
9 the "damage" that Armstrong has "done." (Sep.St. ¶ 51)

10 Before he signed the settlement, Armstrong saw the liquidated damages provision as wrong  
11 and his attorney agreed. (Sep.St. ¶ 52-53) Armstrong's former attorney, Michael Flynn, cannot  
12 testify on Armstrong's behalf because he fears Scientology's retaliation. (Sep.St. ¶ 54)

13 Nancy Rhodes, another one of Flynn's clients who participated in the "universal settlement,"  
14 signed a settlement agreement for which she was paid \$7,500. Her agreement includes a \$50,000  
15 liquidated damages provision. (Sep.St. ¶ 55-56) Flynn also told Ms. Rhodes that the agreement was  
16 not enforceable. (Sep.St. ¶ 57-60)

17 Michael Douglas, another one of Flynn's clients who participated in the "universal  
18 settlement," signed a settlement agreement for which he was paid \$7,500. His agreement includes  
19 a \$50,000 liquidated damages provision. (Sep.St. ¶ 63-64)

20 In an agreement among Flynn and the multiple clients he represented in the "universal  
21 settlement" no mention is made of any relationship between the money each was to receive and the  
22 rights that each person was giving up, or how much damage each person could cause by speaking  
23 out about Scientology. (Sep.St. ¶ 65)

24 At the time of settlement, Armstrong's bargaining power was not at all equal to Scientology.  
25 (Sep.St. ¶ 67) Without ever seeing the agreement, Armstrong was flown from Boston to Los Angeles  
26 where he was positioned as a deal breaker with respect to a multitude of other persons, also  
27 represented by Flynn, that were part of the settlement. In addition, if Armstrong did not sign, fair  
28 game would continue against him and the other settlement participants. (Sep.St. ¶ 68) At the time of

1 settlement, Armstrong's net worth was zero while Scientology's worth was \$500 million. (Sep.St. ¶  
2 69) Before Armstrong arrived in Los Angeles, Mr. Flynn had signed an agreement with Scientology  
3 promising not to represent Armstrong in the future which for practical purposes caused Armstrong  
4 not to be represented. (Sep.St. ¶ 70) Scientology had millions of dollars and a formidable litigation  
5 machine in place and operating which had compromised Armstrong's own attorney. (Sep.St. ¶ 71)  
6 When Armstrong objected to the liquidated damages provision, Mr. Flynn told him that it was not  
7 worth the paper it's printed on. (Sep.St. ¶ 72-73) If Flynn had told Armstrong that the liquidated  
8 damages provision was valid and enforceable, Armstrong would not have signed the agreement.  
9 (Sep.St. ¶ 74)

## 10 LEGAL ARGUMENT

### 11 III. THE LIQUIDATED DAMAGE PROVISIONS ARE UNENFORCEABLE PENALTIES

#### 12 A. The Analysis Is Controlled By Civil Code Section 1671 (d) Because 13 Armstrong At All Relevant Times Was a Consumer Of Scientology

14 *Civil Code* section 1671 prescribes two alternative standards for determining the validity of a  
15 liquidated damages provision. Under subdivision (b), the provision "is valid unless the party  
16 seeking to invalidate the provision establishes that the provision was unreasonable under the  
17 circumstances existing at the time the contract was made." (*Hitz v. First Interstate Bank* (September  
18 14, 1995) 1995 Cal.App. LEXIS 890, 19) Under subdivisions (d), the provision "is void except that  
19 the parties to such a contract may agree therein upon an amount which shall be presumed to be the  
20 amount of damage sustained by a breach thereof, when, from the nature of the case, it would be  
21 impracticable or extremely difficult to fix the actual damage." (*Id.* at 21) Subdivision (d), rather  
22 than (b), controls to consumer contracts. (*Ibid.*)

23 It is without question that Armstrong was a consumer of Scientology's technology from 1971  
24 through 1981 and that the original *Armstrong* litigation arose in the context of this relationship.  
25 Thus, subdivision (d) controls.

26 For liquidated damages to be valid under subdivision (d) of Civil Code section 1671, it  
27 must have been "impracticable or extremely difficult to fix the actual damage." (*Civ.*  
28 *Code* § 1671, subd. (d).) Further, the amount of liquidated damages "must represent  
the result of a reasonable endeavor by the parties to estimate a fair average  
compensation for any loss that may be sustained. (*Garrett v. Coast & Southern Fed.*

1 Sav. & Loan Assn., *supra*, 9 Cal.3d at p. 739.) Absent, either of these elements, a  
2 liquidated damages provision is void, although breaching parties remain liable for the  
3 actual damages resulting from the breach. (*Beasley v. Wells Fargo Bank, supra*, 235  
4 Cal.App.3d at p. 1390.)

5 (*Id.* at 27-28)

6 Since Scientology has failed to come forward with any evidence of having engaged in a  
7 reasonable endeavor to estimate compensation for any breach, the liquidated damages provisions  
8 are void.

9 B. Pursuant To Civil Code Section 1671 (b) The  
10 Liquidated Damages Provisions Are Not Enforceable

11 Subdivision (b) of the 1977 amendments to the statute was "designed to favor enforcement  
12 of liquidated damage clauses by shifting the burden of proof to parties who wish to invalidate  
13 liquidation provisions." (*H.S. Perlin Company, Inc. v. Morse Signal Devices* (1989) 209 Cal.App.3d  
14 1289, 1298) The factors to be considered when analyzing the validity of liquidated damages under  
15 subdivision (b) are set forth in the Comment to the statute. Thus, the

16 "validity of the liquidated damages provision depends upon its reasonableness at the  
17 time the contract was made and not as it appears in retrospect ... All the  
18 circumstances existing at the time of the making of the contract are considered,  
19 including the relationship that the damages provided in the contract bear to the range  
20 of harm that reasonably could be anticipated at the time of the making of the contract.  
Other relevant considerations in the determination of whether the amount of  
liquidated damages is so high or so low as to be unreasonable include, but are not  
limited to, such matters as the relative bargaining power of the parties, whether the  
parties were represented by lawyers at the time the contract was made, the  
anticipation of the parties that the proof of actual damages would be costly or  
inconvenient, the difficulty of proving causation and foreseeability, and whether the  
liquidated damages provision is included in a form contract."

21 (*Civil Code 1671* at Law Revision Commission Comment, 1977 Amendment.)

22 Given the fact that Judge Breckenridge found Armstrong to be "credible, [and] extremely  
23 persuasive" the only way that one can view the harm that would flow from Armstrong telling the  
24 world about his experiences in Scientology would be in conjunction with Scientology's promise to  
25 cease its fair game actions against Armstrong and others. The rationale for this would be that if  
26 Scientology had changed by no longer promulgating and practicing the fair game doctrine, it would  
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1 be unfair and harmful to it for its criminal past <sup>1</sup> to constantly resurface and undermine its efforts in  
2 the present to rehabilitate itself and act properly. Otherwise, how could Scientology be damaged by  
3 Armstrong telling the truth about its abuses and those of its founder?

4 The relationship of the parties at the time the agreement was entered into was disparate.  
5 Scientology had practiced fair game on Armstrong and his attorney, Michael Flynn, for years.  
6 Armstrong did not have any fair game policy of his own that he used to attack Scientology. His  
7 approach to Scientology was then, as it is now, dedication to the truth and faith in God. The  
8 amount of the damages per utterance are extremely high, \$50,000. Such would support an  
9 inference that the parties were not in any equality of bargaining power.

10 Although Armstrong was putatively represented by Michael Flynn at the time he entered into  
11 the agreement, Flynn had already made a deal with Scientology promising never to represent  
12 Armstrong in the future. In addition, Flynn had Armstrong come out to Los Angeles from Boston for  
13 the purpose of executing the agreement even though no copy of the agreement was first provided to  
14 Armstrong. After Armstrong had been presented with a copy of the agreement and balked,  
15 particularly with respect to the liquidated damages provisions, he was positioned as a deal breaker  
16 with respect to the 15 people who were involved in the same universal settlement transaction.  
17 Indeed, Flynn was settling his own claims against Scientology as part of the universal settlement.  
18 Thus, Armstrong was not represented by an attorney with undivided loyalty.

#### 19 **IV. THE LIQUIDATED DAMAGES PROVISIONS ARE UNCONSCIONABLE**

20 Civil Code section 1670.5 provides in part

21 (a) If the court as a matter of law finds the contract or any clause of the contract to  
22 have been unconscionable at the time it was made the court may refuse to enforce the  
23 contract, or it may enforce the remainder of the contract without the unconscionable  
24 clause, or it may limit the application of any unconscionable clause as to avoid any  
25 unconscionable result.

26 The doctrine of unconscionability applies to all provisions of all contracts. (*H.S. Perlin, supra*,

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27 <sup>1</sup> In this regard, the Court is not only referred to Judge Breckenridge's decision, but also to the  
28 case where a number of high-ranking Scientology officials pleaded guilty to burglarizing federal  
government offices and obstruction of justice, (*United States v. Heldt* (1982) 668 F.2d 1238), and  
the case wherein it was held that certain Scientology attorney-client communications fell within the  
scope of intended illegality in relation to the crime-fraud exception to the attorney client privilege.  
(*U.S. v. Zolin* (9th Cir. 1990) 905 F.2d 1344, 1345.)

1 209 Cal.App.3d at p. 1300.) It has both a procedural and substantive element.

2 The procedural element focuses on two factors: "oppression" and "surprise."  
3 [Citations.] "Oppression arises from an inequality of bargaining power which results in  
4 no real negotiation and "an absence of meaningful choice." [Citations.] ... no precise  
5 definition of substantive unconscionability can be proffered. Cases have talked in  
6 terms of "overly harsh" or "one-sided" results. [Citations.] One commentator has  
7 pointed out, however, that "... unconscionability turns not only on a 'one-sided'  
8 result, but also on an absence of 'justification' for it [citation] . . . The most detailed  
9 and specific commentaries observe that a contract is largely an allocation of risks  
10 between the parties, and therefore that a contractual term is substantively suspect if it  
11 reallocates the risks of their bargain in an objectively unreasonable or unexpected  
12 manner. [Citations.] But not all unreasonable risk allocations are unconscionable;  
13 rather, enforceability of the clause is tied to the procedural aspects of  
14 unconscionability [citation] such that the greater the ... inequality of bargaining  
15 power, the less unreasonable the risk allocation which will be tolerated.

16 (*Id* at 1301) <sup>2</sup>

17 In the instant case, there is serious unconscionability in the procedural sense given the  
18 inequality of bargaining power between Scientology and Armstrong, as discussed above and set  
19 forth in greater detail; in Armstrong's separate statement. What is most obvious is the substantive  
20 unconscionability. It is clear that as Scientology seeks to have it enforced the agreement is one-  
21 sided: Scientology can slander Armstrong and he must remain mute or get hit with a \$50,000  
22 liquidated damage assessment. What is the possibly justification for such a one-sided agreement? If  
23 you listen to Scientology, it is because Armstrong is a liar and fomenter of anti-Scientology litigation.  
24 But if what Scientology says is true, you must throw out the decision of Judge Breckenridge which  
25 has been affirmed on appeal in a published decision. That makes no sense. It makes no sense to  
26 accept the characterization of an organization that has a long recorded history of abuse of  
27 individuals and the legal system and to disregard a well-respected superior court judge.

28 The only way that the liquidated damage provision makes sense is if Scientology had in fact  
foresworn its policy and practice of fair game. If that, in fact, was true, then Scientology could be

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24 <sup>2</sup> The first court to have reviewed the settlement agreement said, "So my belief is Judge  
25 Breckenridge, being a very careful judge ... if he had been presented with that whole agreement and  
26 if he had been asked to order its performance, he would have dug his feet in because that is one ...  
27 I'll say one of the most ambiguous, one-sided agreements that I have ever read. And I would have  
28 not ordered the enforcement of hardly any of the terms if I had been asked to, even on the threat  
that okay, the case is not settled. [¶] I know we like to settle cases. But we don't like to settle cases  
and, in effect, prostrate the court system into making an order which is not fair or in the public  
interest." (Sep.St. ¶100)

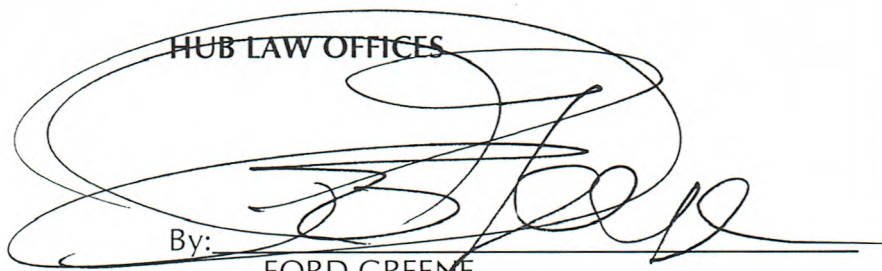
1 hurt by the constant resurgence of its dirty past. Assuming without conceding the truth of the  
2 forgoing proposition, Scientology never gave up fair game because it proceeded to slander  
3 Armstrong almost as soon as the ink had dried on the paper in an effort to dead agent him through  
4 black propaganda. This being the case, there is no objective harm that the liquidated damage  
5 provisions could cure because what Armstrong had to say was the truth. The only way that the truth  
6 could be harmful to Scientology was if Scientology was trying to suppress the truth while continuing  
7 to engage in illegality and misconduct which then brings one back to the argument that the  
8 agreement is void because it violates public policy.

9 In sum, whichever way one analyses the liquidated damage provisions, one can only  
10 conclude that one way or the other said provisions are unconscionable and should not be enforced.

11 **V. CONCLUSION**

12 Based on the foregoing, Defendant Gerald Armstrong respectfully requests that the motion  
13 for summary adjudication should be denied.

14  
15 DATED: September 18, 1995

16 **HUB LAW OFFICES**  
17   
18 By: \_\_\_\_\_  
19 FORD GREENE  
20 Attorney for Defendant  
21 GERALD ARMSTRONG  
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**PROOF OF SERVICE**

I am employed in the County of Marin, State of California. I am over the age of eighteen years and am not a party to the above entitled action. My business address is 711 Sir Francis Drake Boulevard, San Anselmo, California. I served the following documents:

DEFENDANT'S OPPOSITION TO MOTION FOR SUMMARY ADJUDICATION ON THE THIRTEENTH, SIXTEENTH, SEVENTEENTH AND NINETEENTH CAUSES OF ACTION; ARMSTRONG'S SEPARATE STATEMENT OF DISPUTED AND UNDISPUTED FACTS IN OPPOSITION TO MOTION FOR SUMMARY ADJUDICATION OF THE TWENTIETH CAUSE OF ACTION ON THE SECOND AMENDED COMPLAINT; DEFENDANT'S EVIDENCE IN OPPOSITION TO MOTION FOR SUMMARY ADJUDICATION ON TWENTIETH CAUSE OF ACTION

on the following person(s) on the date set forth below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid to be placed in the United States Mail at San Anselmo, California:

Andrew Wilson, Esquire  
WILSON, RYAN & CAMPILONGO  
235 Montgomery Street, Suite 450  
San Francisco, California 94104

BY HAND

LAURIE J. BARTILSON, ESQ.  
Bowles & Moxon  
6255 Sunset Boulevard  
Suite 2000  
Los Angeles, California 90028

- (Personal Service) I caused such envelope to be delivered by hand to the offices of the addressee.
- (By Mail) I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at San Anselmo, California.
- (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

DATED: September 18, 1995